MV 97-6
Tax Type: MOTOR VEHICLE USE TAX
Issue: Rolling Stock (Vehicle Used Interstate For Hire)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
	)	**No.**
v.	)	**No.**
	)	**IBT**
TAXPAYER,	)	
	)	**Charles E. McClellan**
Taxpayer	)	**Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Gary Stutland, Special Assistant Attorney General, for the Department of Revenue; Gail Morse, McDermott, Will & Emery for TAXPAYER

Synopsis:

This matter came on for hearing pursuant to the taxpayers' timely protest of Notices of Liability ("NTL") issued by the Department on May 26, 1992 (for the period March 1988 through November 1990), December 29, 1992 (for the months of July, September, November and December 1989), December 22, 1993 (for the month of September 1990), and December 13, 1993 (for the months of October and November 1990) to TAXPAYER ("taxpayer") for Illinois Use Tax, RTA Use Tax plus penalties and interest. The Department and D&D entered into a stipulation ("Stip.") and an evidentiary hearing was held on

October 22 and 24, 1996 at 100 West Randolph, Chicago, Illinois. The issue is whether the taxpayer is liable for Illinois Use Tax in connection with the purchase of 33 trucks purchased during the audit periods for use in its business. Taxpayer contends that the vehicles are exempt as rolling stock used in interstate commerce. Based on the record consisting of a stipulation of fact, the testimony of the witnesses and documentary evidence in the record, I recommend that the Department's determination as adjusted in re-audit, be finalized.

Findings of Fact:

1. The Department audited the books and records of the taxpayer for the period beginning March 1988 through December 1990. NTL XXXXX showing Illinois Use Tax, penalty and interest due of $90,531 was issued on May 26, 1992. Taxpayer filed a timely protest, and the case was docketed as Case No. XXXXX. (Dept. Group Ex. No. 1)

2. Case No. XXXXX was returned to the Department for re-audit and three additional NTL's were issued subsequently as follows:

NTL Number	Date	Amount
SF XXXXX	Dec. 29, '92	
Audit periods:	July, Sept., Nov., Dec., '89	$13,933
SF XXXXX	Dec. 22, '93	
Audit period:	Sept., '90	2,222
SF XXXXX	Dec. 13, '93	
Audit periods:	Oct., Nov., '90	3,691

Dept. Exs. 2, 3, 4.

3. Taxpayer filed timely protests to these three Notices of Tax Liability which were docketed as Case No. XXXXX and they were also returned to the Department for re-audit. (Dept. Exs. No. 2, 3, 4)

4. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Correction of Returns showing additional tax due for the audit periods. (Tr. p. 18; Dept. Group Exs. No. 1 through 4)

5. Taxpayer was incorporated in Illinois on November 28, 1979. (Stip. Ex. No. 3)

6. Taxpayer is one of four corporations owned by the father[1] of TAXPAYER, who testified on behalf of taxpayer. (Tr. pp. 46, 50)

7. The other companies are: LR, incorporated in Illinois on October 10, 1980 ("LR"); LT, incorporated in Illinois on October 28, 1985 ("LT"); and DE, a company that manages the other three companies. (*Id*; Stip. Exs. No. 4, 5)

8. Taxpayer is located at, Illinois. (Tr. pp. 75, 76)

9. LT is located at, Illinois. (Tr. p. 54)

10. LR is located at Illinois. (Tr. pp. 54, 55; Stip. Ex. No. 7)

11. Taxpayer and LR are registered with the Illinois Commerce Commission as exempt interstate carriers. (Stip Exs. No. 1, 2)

12. These companies, although separate corporations, are a family business operation operated by TAXPAYER, his father and TAXPAYER's brother and sister. (Tr. p. 131)

13. Using conventional garbage trucks and dumpster (roll-off) trucks, taxpayer picks up various materials and brings them either to LT or LR. (Tr. pp. 50, 52, 53; Stip. Ex. No. 23)

14. Taxpayer obtains its customers by soliciting or cold calling potential customers which have SIC codes that indicate they

might have generic types of waste and products that would work through the system operated by taxpayer and its related corporations. (Tr. p. 80)

15. TAXPAYER, his brother and sister and three other sales people were involved in soliciting customers. (Tr. pp. 80, 81)

16. They solicited customers by telephone and later by visiting them personally. (Tr. p. 81)

17. Taxpayer does not seek out wet garbage or residential garbage. (Tr. p. 125)

18. The type of material taxpayer picks up from these customers is primarily paper which it takes to LR's facility. (Tr. p. 126)

19. Taxpayer has customers such as XXXXX.(Tr. p. 126)

20. Taxpayer negotiated prices with its customers taking into account the product to be picked up and the frequency of pick ups. (Tr. pp. 81, 82)

21. Taxpayer's agreements with its customers are for a trash pick up service. (Tr. 80)

22. LT is the transfer station to which loads containing minimal amounts of recyclable material are brought by taxpayer's trucks. (Tr. p. 53)

23. The trash brought into LT is dumped and sorted and then re-loaded, the recyclable materials for transfer to LR and the balance to be trucked to landfills. (Tr. pp. 56, 60, 123, 124; Stip. Ex. No. 23)

24. LT invoices taxpayer each month for the commodities taxpayer brought in during the month. (Tr. p. 58)

25. LT is invoiced by the landfill operators for the material dumped each month. (Tr. pp. 59, 60)

26. At LR's facility the material is sorted, separating paper, corrugated material, plastic and metal. (Tr. pp. 66, 67, 127)

27. LR sells the recyclable materials to its customers at prices that are published in a trade journal. (Tr. pp. 69, 100)

28. The sorted material is loaded on trucks, most likely tractor-trailer rigs for transport to the landfills or the reclamation plants that are purchasing the material from LR. (Tr. pp. 105, 106; Stip. Ex. No. 23)

29. Most of the material recycled at LR's facility is shipped to customers who are located outside of Illinois. (Tr. p. 134; Stip Exs. No. 16, 23)

30. The trucks hauling the material out of Illinois from the facilities operated by LR and LT might belong to LR, LT or somebody else. (Tr. p. 106; Stip Exs. No. 12, 17, 18)

31. LR invoices taxpayer monthly for the material taxpayer brought in during the month. (Tr. p. 58)

32. There are 33 vehicles at issue. (Stip. ¶ 8; Stip. Ex. No. 6)

Conclusions of Law:

The evidence on record in this case, consisting of the stipulation, and the hearing transcript and exhibits, establishes that the taxpayer has failed to overcome the Department's *prima facie* case of tax liability under the assessments in question. Accordingly, by such failure, and under the reasoning set forth below, the determination by the Department that taxpayer owes the tax liability set forth in Notices of Tax Liability XXXXX, XXXXX, XXXXX, XXXXX, as adjusted by re-audit, must stand as a matter of law. In support thereof, the following conclusions are made:

The issue is whether the 33 vehicles (tractors, pickups and a GMC cab[2]) listed on Stip. Ex. 6 are exempt as rolling stock used in interstate commerce.

The Illinois Use Tax Act, 35 ILCS 105/3, imposes a tax on the privilege of using in Illinois tangible personal property purchased at retail. Section 3-55(b) of the Illinois Use Tax Act (35 ILCS 105/3-55(b)) exempts tangible personal property used in Illinois by an interstate carrier for hire as rolling stock moving in interstate commerce. Specifically, the exemption, insofar as it is relevant to this case, reads as follows:

> (b) The use, in this State, of tangible personal property by an interstate carrier for-hire as rolling stock moving in interstate commerce . . . as long as so used by the interstate carrier for-hire.
>
> (35 ILCS 105/3(b)).

[2] This parenthetical description of the vehicles in issue is taken from Stip. Ex. No. 6. The vehicles are not described in any more detail elsewhere in the record.

The statute makes it clear that an interstate carrier for hire is entitled to the exemption for rolling stock used just between points in Illinois if the interstate carrier is using the property in connection with an interstate shipment of property or persons with the following language:

> The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois.
>
> (35 ILCS 105/3-60)

Thus, the exemption does not apply to vehicles which a taxpayer is using to transport its own employees or property or property which it is selling and delivering to its customers. (86 Admin. Code ch. I § 130.340).

In applying these statutory provisions to the facts of this case, two principals of statutory construction are governing. First, the Use Tax Act unambiguously was intended to tax all tangible personal property purchased at retail for use in Illinois unless specifically exempt. Square D Co. v. Johnson, 233 Ill. App.3d 1070 (1st Dist. 1992). Second, a statutory exemption must be strictly construed against the taxpayer and in favor of the Department. Burlington Northern, Inc. v. Department of Revenue, 32 Ill. App.3d 166. (1st Dist. 1975).

Within this framework, the taxpayer had the burden of overcoming the Department's case. Once the Department introduced the corrections of return, its *prima facie* case was made, and the burden

of proof shifted to the taxpayer. A taxpayer cannot overcome the Department's *prima facie* case merely be denying the accuracy of the Department's determination. Central Furniture Mart v. Johnson, 157 Ill. App.3d 907 (1st Dist. 1987). Simply questioning the Department's assessment or denying its accuracy is not enough. Quincy Trading Post v. Dept of Revenue, 12 Ill. App.3d 725 (4th Dist. 1973). A taxpayer can overcome the Department's *prima facie* case by producing competent evidence identified with the taxpayer's books and records. Vitale v. Department of Revenue, 118 Ill. App.3d 210 (3rd Dist. 1983). In this case the taxpayer failed to meet its burden of proof.

That the trucks in question are tangible personal property purchased at retail for use in Illinois is not an issue. The issue is whether taxpayer used the vehicles as "an interstate carrier for hire" so as to qualify for the rolling stock exemption.

The taxpayer was registered by the Illinois Commerce Commission as an exempt interstate carrier and the record indicates that a substantial amount of the material taxpayer picked up from its customers did end up being shipped outside of Illinois to the final users. However, that does not prove that the taxpayer was an "interstate carrier for hire" or that the trucks in question were used in interstate commerce "for hire". The record indicates that taxpayer's employees solicited its customers and entered into agreements with those customers to provide a trash pick up service. Although taxpayer's vice president testified that some of the taxpayer's customers directed where the waste material taxpayer picked up from their premises was to go, he did not know if there

were any written agreements in this regard. (Tr. p. 90, 91) In addition, there is no documentary evidence in the record to support this testimony or to indicate that any of taxpayer's customers knew or cared about the ultimate destination of the material picked up by taxpayer.

There is no evidence in the record that indicates that taxpayer's customers retained indicia of ownership in the trash picked up by taxpayer. The record in this case leads to the common sense conclusion that once taxpayer's customers put their trash out for collection, they abandoned it. Indeed, abandonment is the cornerstone of the refuse collection business. C & A Carbone v. Town of Clarkstown, N.Y., 114 S. Ct. 1677 (1994). If it weren't, refuse collectors would be thieves. Furthermore, the record indicates that the agreement between taxpayer and its customers was for a pick up service. Taxpayer was not retained as a carrier for hire, interstate or otherwise. Taxpayer was hired to pick up trash. (Tr. 80)

The record indicates that after the taxpayer picked up the trash, taxpayer exercised indicia of ownership when it delivered the trash it collected to LR and LT where recyclables were sorted out and sold and from which the unsalvagable refuse was trucked off to landfills. After the material was delivered by taxpayer's trucks to LR or LT, taxpayer had nothing more to do with it. LR and LT charged taxpayer for the material it delivered on a monthly basis. (Tr. p. 58) The record indicates that it was clearly taxpayer's unilateral decision to take the waste material either to the facility of LR or LT. There is no evidence in the record to indicate that taxpayer's

trucks at issue ever picked up any waste material outside of Illinois, nor that they transported waste material to any destination other than to the facilities of LR and LT in Illinois. Further, the record shows that the sale of recyclable material and its transfer out of state and the transfer of non-recyclable trash to landfills out of state was not done by the taxpayer. It was done by other entities, either LR, LT or some other hauler. If taxpayer did not own this trash, it would have had no right to transfer it to anybody for sorting and possible sale. Therefore, the record in this case indicates that taxpayer was transporting its own material from its customers to LR and LT and was not functioning as a carrier for hire.

Neither party filed briefs in this case, but both made closing arguments at the conclusion of the evidentiary hearing. First, taxpayer argues that the fact that there were three corporations involved in this venture should be ignored because they were all part of a family operation. (Tr. pp. 156, 157) Taxpayer cites no authority for this proposition, however. Therefore, the fact that it is taxpayer's activities that are involved in this case, not the activities of LR and LT, cannot be ignored.

Next, Taxpayer asseverates that the courts' decisions in Burlington Northern, Inc., *supra*, and United Parcel Service, Inc. v. Comptroller of the Treasury, 69 Md. App. 458, 518 A.2d 164, require the conclusion that the trucks in question qualify for the rolling stock exemption because, as in those two cases, most of the material taxpayer transported started its journey in one state and ended it in another. This argument fails for three reasons. First, there is no evidence in the record that proves that any of the 33 vehicles in

issue were used by the taxpayer to haul material for hire across state lines. Taxpayer's vice president testified that taxpayer's trucks picked up material from its customers and brought it to the facilities operated by LT or LR for sorting and transport. (Tr. pp. 50, 52, 53; Stip. Ex. No. 23) The customers which he identified and these facilities were located in Illinois. (Tr. pp. 54, 55; Stip Ex. No. 7) As noted previously, after the material was delivered by taxpayer's trucks to LR or LT, taxpayer had nothing more to do with it. LR and LT charged taxpayer for the material it delivered on a monthly basis. The record shows that after taxpayer delivered the material to LR or LT, taxpayer no longer had any indicia of ownership in the material nor did it have any further responsibility for disposing of the material. Once the material was sorted at the facilities of LR or LT, the recyclable material was delivered to LR's customers or to landfills. The record indicates that at this point LR or LT, as the case may be, had all the indicia of ownership of the material since they were the entities that were making the decisions and were, in fact, sorting, selling or transferring the material for final disposition. Furthermore, the record shows that the trucks hauling the material from the LR and LT facilities were not taxpayer's trucks. Rather they were trucks belonging to LR or LT or somebody else. (Tr. p. 106; Stip Exs. No. 12, 17, 18) Therefore, in this case the trucks at issue were not used by the taxpayer in transporting property belonging to someone else for hire across state lines as was the situation in Burlington Northern, Inc., and United Parcel Service, Inc., *supra*,

The second reason taxpayer's reliance on Burlington Northern, Inc., and United Parcel Service, Inc., *supra*, fails is that in both of those cases, the taxpayers were not transporting their own property. Rather, consignors hired the taxpayers to transport property belonging to the consignors across state lines for delivery to consignees chosen by the consignors and the vehicles in question were used by the taxpayers in that endeavor. The property being hauled in those cases did not belong to the carriers as it does in this case. For that reason the vehicles in question in those cases were determined to be rolling stock used in interstate commerce for hire. Because the vehicles involved in this case are used by the taxpayer to transport its own property they do not qualify as rolling stock used by an interstate carrier for hire.

The third reason taxpayer's reliance on Burlington Northern, Inc., and United Parcel Service, Inc., *supra*, is misplaced is that both of these companies were engaged in the business of transporting property of their customers across state lines. In this case, the record indicates that taxpayer used the vehicles in question to transport its own property between customers locations in Illinois to its own facilities in Illinois. That is not the same as being an interstate carrier for hire.

WHEREFORE, for the reasons stated above, it is my recommendation that the assessments as determined by the Department as adjusted during re-audit which are the subjects of these cases be upheld in full.

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Date

Charles E. McClellan
Administrative Law Judge